Anti-Corruption Obligations and the UK System of Prosecution

A summary of the Chatham House International Law discussion group meeting held on 30 April, 2007.

The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government and embassy representatives.

The event was sponsored by Clifford Chance.

Speakers:

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Background to the Organization for Economic Cooperation and Development (OECD) Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has its roots in a corruption scandal involving the United States and Japan in the 1970s. As a result of this incident, the United States Securities and Exchange Commission urged the passage of what became the *Foreign Corrupt Practices Act*, which played an important role in stabilizing markets and in ensuring the predictability of the placement of business. It was vigorously applied, with the result that US businesses became cleaner but were, it was argued, unfairly burdened compared to companies elsewhere. This lead to the creation of the OECD Anti-Bribery Convention, which the United Kingdom signed, somewhat reluctantly, in 1997. A key part of the Convention is the monitoring exercise, which represents an important shift in how the international community uses international legal instruments to compel common conduct from member states. In 1999, the 36 signatories to the Convention were subject to Phase One monitoring to determine whether or not they had passed the necessary legislation. It was determined that the United Kingdom and Japan had not done so, as they had failed to criminalize the payment of bribes made to foreign officials. As Home Secretary, Jack Straw made promises that this would be corrected, but he left soon after for the Foreign Office and no further action was taken. After 11 September, 2001, the focus shifted to anti-terrorism legislation. The 2001 *Anti-Terrorism, Crime and Security Act* was used, oddly, to impose criminal liability on those who bribed foreign officials, although the implementation of this section was delayed by four months. In the meantime, signatories to the OECD convention were subject to Phase 2 monitoring to

determine whether or their laws had been enforced; the UK again failed, in part because there had been no prosecutions. The 2005 OECD Phase 2 monitoring report, which was accepted by the UK government, highlighted a host of problems. Some of these problems have been addressed, but others, including the extent of prosecutorial discretion and liability of agents acting with the consent of their principals, remain outstanding. Paragraph 182 from that report states (emphasis added):

182. The 1906 Act uses the concepts of principle and agent and conceives of corruption as the suborning of the agent to the detriment of the principal. Under general principles of the law of agent and principle, the informed consent of the principal to the agent's actions is generally a defence to the liability of the agent. Article 1 of the Convention does not contemplate an exception to the offence of foreign bribery where the person bribed acts with the consent of his/her principal. The UK authorities have indicated that a defence based on the consent of the principal to the agent receiving the bribe "has no basis in current UK law" and would not apply in foreign bribery cases. However, in the absence of case law to support the UK government's position, the lead examiners are concerned that the agency/principle basis of the foreign bribery offence could lead to interpretations of the offence that are not in compliance with the Convention. Agents of foreign governments may often accept bribes with the knowledge or acquiescence of their supervisors or managers; the courts could possibly consider such individuals to be "principles" in some cases. While the lead examiners do not reject the UK authorities' position, they believe that this issue should be followed up by the Working Group.

The British Aerospace Case

Against this backdrop there were, from the spring of 2005, newspaper reports about the conduct of British Aerospace in relation to the Al-Yamamah contract with the government of Saudi Arabia.[1] (British Aerospace has consistently denied any wrongdoing, although they have not denied making payments to Saudi officials.) The Serious Fraud Office arrested two people and began to investigate the payments made. Unusually for a criminal investigation, the SFO and Attorney General's office seem to have been in regular contact with the solicitors of British Aerospace. The Attorney General undertook a 'Shawcross exercise' and consulted the Foreign Secretary, the Defence Secretary, and the Prime Minister in relation to this case. It appears that there were no issues of national security raised until shortly before the announcement not to proceed with the investigation was made. The Attorney General himself seemed to have been more concerned with whether a prosecution would succeed on evidentiary grounds, precisely on the point of consent which the UK had assured the OECD was inapplicable. The *Freedom of Information Act* disclosure given from the Attorney General's office to the *Financial Times* shows that the security issue was not raised until late in the investigation and was plainly dictated from the Prime Minister at the end of November 2006. On 14 December the Attorney General announced in the House of Lords that the Serious Fraud Office had decided to discontinue the investigation due to

[1] Background information on this case can be found at:
http://www.guardian.co.uk/armstrade/story/0,,1828253,00.html
http://news.bbc.co.uk/1/hi/business/6181949.stm
http://news.bbc.co.uk/1/hi/uk_politics/6319833.stm
http://news.bbc.co.uk/1/hi/uk_politics/6275199.stm
http://news.bbc.co.uk/1/hi/uk/6604629.stm

national security considerations[2], and the issue has been before Parliament since that time. The issue is of great concern to OECD member states, including the United States, who collectively expressed grave concern at the Working Group on Bribery in March 2007. The questions are – what is this national security interest that would justify suspending the ordinary application of the rule of law and is it compatible with the Convention to use national security arguments?

National Security and the OECD Convention

A legal analysis of Article 5 of the Convention shows that it is unlikely that there is a national security exception to the Convention. The Article states (emphasis added):

5. Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. <u>They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved</u>.

The Article does not make any reference to national security nor does any other part of the Convention. The official commentary is also silent on the issue. The commentary does, however, recognize prosecutorial discretion under national legal regimes, although it emphasizes that such discretion must be exercised for professional, not political, motives.

The ordinary rules of treaty interpretation under the Vienna Convention indicate that one should look to the intention of the drafters by interpreting the ordinary meaning of the terms in good faith, by looking at the treaty as a whole, and by considering any other rules of international law applicable to the relations between the parties. If further clarification is required, one can refer to the negotiating history. Lord Goldsmith indicated that the Serious Fraud Office felt there was a need to balance the rule of law against the wider public interest. This in and of itself would seem to indicate that the Serious Fraud Office felt there was no such exemption in the Convention itself.

Where States have wanted to include a national security exception they have done so explicitly. Examples include the 1955 Treaty of Amity and Economic Relations and Consular Rights between Iran and the United States and the 1991 bilateral investment treaty between Argentina and the United States. This would seem to indicate that if the drafters had wanted to include such an exception, they would have done so *or* their desire for doing so would have been recorded in the negotiating history. Where national security has been included in the treaty language, the international case law is clear that such a determination is to be applied in accordance with objective criteria, and is not a matter for subjective determination. Thus, the better view is that there is no implicit national security exception (understanding that this has never been subject to authoritative interpretation by a domestic or international tribunal) and, even if there is, it is not for each state for determine for itself but is a matter for judicial review.

Under international law more generally, the doctrine of necessity exists to protect the essential interests of nations in extreme circumstances. The conditions for invoking this

[2] See http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61214-0013.htm#06121476000003

doctrine are strict and include a lack of alternative means for achieving security. This doctrine could be invoked if the conditions were met, and would preclude wrongfulness. It is not immediately apparent that the conditions would be met in the present case. The concern of the British government seems to be that if the prosecution against British Aerospace were to proceed, Saudi Arabia would withhold important information relating to the fight against terrorism. This claim must be examined in the context of the totality of obligations between the United Kingdom and Saudi Arabia in international law, which include various resolutions of the United Nations Security Council. Security Council Resolution 1373 binds member states to cooperate in combating terrorism and to afford each other the "greatest measure of assistance" in connection with investigations. An attempt by one state to blackmail another by threatening to withhold information relevant for terrorism investigations would be contrary to its binding international legal obligations. States cannot "cherry pick" international law but must agree to be bound by all of it.

In conclusion, it is doubtful that the Convention has a national security exception. If such an exception does exist, Article 5 provides that the effect on relations with another state may not be taken into account. As an international law instrument, this phrase must be construed in accordance with the object and purpose of the Convention, so as to ensure that it has real and practical effect. The kinds of effects on relations that might occur if a bribery investigation is continued can easily be identified. They include a withdrawal of diplomatic co-operation, ending of co-operation on intelligence sharing, and other similar matters. These are precisely the matters relied upon by the UK.

However, Article 5 requires that these effects should be ignored because they are effects on the relationship between states. The Convention cannot be interpreted to allow one state to make diplomatic threats or use blackmail to achieve the aim of ending a bribery investigation. Such conduct is squarely prohibited by the wording and spirit of Article 5 and would defeat the purpose of the multilateral Bribery Convention under which states each agree not to submit to pressure or blackmail in individual cases (whatever the consequences) to advance the common good for all states.

Finally, what constitutes a national security exception is not for each state to determine for itself but can only be relied upon by reference to objective criteria that are capable of review by independent adjudicatory bodies Any other conclusion would undermine the objectives of the Convention.

Discussion

A question was raised in relation to national prosecutorial discretion and to what extent this is constrained by treaty obligations. There could be a case, for instance, when the Attorney General may feel compelled not to continue with a prosecution, if so doing would lead to the release of sensitive national security information. Is it conceivable that a state would agree to a treaty which would prevent it from avoiding such a breach of its security? It was pointed out that there is a residual right under the rules of international law on state responsibility for states to take exceptional measures in circumstances of necessity. It is also open to states to make reservations to a treaty on national security or other grounds; the United Kingdom chose not to do so in relation to the OECD Convention, although Canada did so. When a state is a party to a convention, it may often constrain its domestic discretion. Article 5 is clear as to what states can*not* take into consideration when deciding whether or not to prosecute. At the very least, no claim

to national security which involved the considerations in Article 5 would be permissible under the Convention.

Are there objective criteria for a national security exception? As the international case law does not give detailed criteria, it will essentially come down to a good faith review of the facts. Given the right facts, the UK government could seek protection under the general international law rule of necessity. This would not be inconsistent with its obligations under the Convention. But in the British Aerospace case, no such claim has been presented to the treaty parties. Nor have any objective criteria been applied, but UK has appears to be entirely self-judging. This is the why the OECD Working Group decided to undertake another formal inquiry into UK conduct.

The role of the Attorney General in relation to the Serious Fraud Office was discussed. It was generally agreed that only the Attorney General has the authority to invoke Shawcross exercises in order to determine countervailing public interest. However, the criteria for prosecution in domestic cases include consideration of the public interest. However, domestic discretion has been constrained by international obligations. Article 1 of the Convention criminalizes the payments of bribes to foreign officials. If the ingredients are met, a prosecution must proceed.

Methods to improve the treaty and its implementation were discussed. The OECD Working Group on Bribery has already made some useful recommendations, and several constructive measures have been adopted. However, advocacy groups should be careful not to recommend changes to the text of the treaty if it is the implementation, rather than the wording itself, which appears to be the problem. Further, an amendment to the Convention might be difficult if not impossible to achieve.

A representative of the Foreign Office pointed out that the United Kingdom did offer explanations for its decision to member states of the OECD and in no way had sought to undermine the workings of that organization. However, there appears to be a problem in terms of the way the actions of the United Kingdom have been perceived. Practical steps that could be taken to correct this situation were discussed. The treaty itself does not contain a dispute mechanism to deal with breaches of its provisions, leaving these to be addressed by domestic proceedings. Politically, the UK should position itself as a strong supporter of anti-corruption efforts and address the legitimate concerns of the OECD. It was noted that the implementation of the Chemical Weapons Convention has been compromised by the deliberate diplomatic undermining of a member state, and care should be taken to avoid the same in relation to the OECD Convention. The OECD has an important role to play generally, not only in combating corruption, and its capabilities should not be weakened.